



EMPLOYMENT TRIBUNALS

Claimant: Miss S Kinsella

Respondent: Glitterarti Limited

Heard at: Liverpool

On: 15 November 2021

Before: Employment Judge Benson

REPRESENTATION:

Claimant: in person

Respondent: Mr P Lonergan - consultant

JUDGMENT having been sent to the parties on 19 November 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

WRITTEN REASONS

Claims and Issues

1. The claimant brings claims of:
 - a. automatic unfair dismissal pursuant to section 103A Employment Rights Act 1996;
 - b. a claim of unauthorised deductions from wages pursuant to Part II of the Employment Rights Act 1996
 - c. a reference for a declaration of unnotified deductions pursuant to sections 11 and 12 of the Employment Rights Act 1996.
2. The issues which were to be decided at this hearing were those set out by Employment Judge Buchanan in his order following the preliminary hearing on 20 August 2021 as follows:

- a. Was the claimant an employee or worker of the respondent company? The claimant contends she was an employee. The respondent contends she was a worker.
 - b. If the claimant was an employee, was the reason for her dismissal in November 2020 that she had made a protected disclosure to the respondent namely that it had claimed furlough pay for her which it had unlawfully retained and which disclosure the claimant reasonably believed tended to show the commission of a criminal offence or a failure to carry out a legal obligation on the part of the respondent? Did the claimant reasonably believe any such disclosure was in the public interest in that public money was at stake?
 - c. Has the respondent made unauthorised deductions from the wages of the claimant in respect of furlough pay or otherwise?
 - d. Did the respondent fail to provide itemised payslips to the claimant at any time during her employment? If so, were there unnotified deductions made from the wages of the claimant? Were there any such deductions in the thirteen weeks before the presentation of the claim on 2 December 2020?
 - e. What remedy should the claimant receive in respect of any of the claims above?
3. I discussed these issues with the parties at the outset of the hearing. The claimant confirmed that it was her position that she was dismissed on 5 November 2020. She confirmed that she had found out on 10 November that payments had been made to her account at HMRC, which she believed were furlough payments and that it was on that date that she made her disclosure which she says is protected. I raised with her at that stage that on her own case the disclosure post-dated her dismissal and as such it could not have been the reason that she was dismissed. I indicated that we would need to hear evidence about the date of dismissal as Mr Lonergan initially indicated that his client took the view that the claimant had resigned.
4. During this judgment I have sometimes used language relevant to an employer/employee relationship, rather than that of a worker. Nothing should be read into that as, it was agreed at the outset of the hearing that, I was not required to make a decision on the claimant's status. The reason for this was that it was only in respect of the claim of automatic unfair dismissal that the claimant needed to have the status of an employee to pursue. If she was not an employee, then her allegation of dismissal would be one of a detriment for making a protected disclosure and the claim could be pursued on that basis.

Evidence and Submissions

5. I heard evidence from the claimant and from Miss G Kane, the owner and director of the respondent. I was provided with written statements and a bundle of documents, which included copies of WhatsApp and Facebook messages which the parties agreed comprised all of the communication between them during the relevant period. During the course of the day

enquiries were made of the respondent's accountants who were able to produce other relevant documentation and clarification.

Findings of Fact

6. The claimant worked for the respondent from May 2019 until her contract ended in November 2020. The respondent provides party entertainment and character experiences. She worked with the respondent on a casual basis.
7. At the start of the pandemic in March 2020 the events which the respondent company ran ceased. There was therefore no work available for the claimant. On 16 March 2020 the claimant, through a series of social media messages advised Miss Kane that she was having to shield as a result of her medical conditions.
8. On 20 March the claimant advised Ms Kane of the existence of a furlough scheme which she hoped might reassure her that the government would be paying up to 80% of staff's wages. At the time, the scheme and the arrangements which the government was putting in place to support businesses and workers were unclear and developing by the day.
9. On 20 April Ms Kane sent a message to the claimant saying: "You fit within the furlough staff scheme even though you are on zero hours. They will average a typical week out so that you will get some sort of payment. Will be applying for it as soon as possible." Ms Kane thereafter says to the claimant that [furlough] is at the discretion of the employer, but she is going to do it. She also explains how the payments will be worked out. The claimant replies that she thought it would be worked out differently and says "that'll be a relief if we get that tho coz at least we will be able to get something".
10. The claimant kept in contact with Ms Kane during the summer of 2020 about her shielding and also asked about when work was likely to resume. She separately sent a couple of messages on WhatsApp asking about her furlough pay, which Ms Kane didn't receive as she no longer had access to WhatsApp. She remained absent from work until 17 October when she asked Ms Kane again about furlough payments. For the first time, Ms Kane explained that there had been some difficulties because and I am paraphrasing, there had been a mess up with payroll and she wasn't registered. She apologised and offered to do anything she could to help. It was clear the claimant was not going to receive any furlough. The claimant was very unhappy at that stage and tried to understand what had gone on. She continued to chase Ms Kane for an explanation as to how and why this has happened and whether there was a way of sorting it out. There were various messages on 4 November between Ms Kane and the claimant. Ms Kane explained that there is nothing she could do and told the claimant that there was a new furlough scheme opening and that Miss Kinsella could register for that.
11. There then followed a number of pressing messages from the claimant as she was trying to understand what had gone on. She said she has had no money and no work from the respondent. Ms Kane would not engage and referred the claimant to the respondent's accountant. Ms Kane was not able to

answer the claimant's questions and felt under pressure by the claimant wanting answers that she could not provide.

12. On 5 November there followed further messages from the claimant. She was unhappy that three members of staff had been paid furlough pay but others hadn't. Ms Kane was with her accountant and said that her accountant would call the claimant to explain. The claimant did not want to have a conversation at that stage. She was irate and frustrated. The claimant did not agree with the explanations which Ms Kane was providing in the messages about what had gone wrong. She was also becoming increasingly more agitated in her messages, and at 14.20 Ms Kane messaged the claimant with two options: she said that the claimant could stay with the company and be put into the new furlough scheme which would pay her £33.43 until the end of March; or she would find the money to repay her and send her P45 as she was cutting the team right down as they would be closed for the foreseeable future. The claimant initially indicated that she would accept the backdated pay and take her P45 but the agreement broke down as the amount of the backpay could not be agreed. Ms Kane was offering the sum of £33.43 per week which was a figure that had been calculated by the accountants, but the claimant disagreed.
13. The claimant was clearly still unhappy and continued to press for an explanation from the respondent. At 18.07 that evening, Ms Kane's partner messaged the claimant from Ms Kane's number on her behalf withdrawing the offer of the goodwill payment. He told the claimant that she would not be added to the new furlough scheme and he confirmed that Ms Kane was giving her four weeks' notice of termination. The claimant considered that her contract terminated that day and that has been agreed by the respondent.
14. The claimant continued to make enquires of HMRC concerning the payments made in respect of her tax as she did not have payslips to refer to. On 10 November the claimant notified Ms Kane that she had discovered from HMRC that it had made furlough payments to her from 6 April 2020 to 2 November 2020 and asked if she could once again check whether she had in fact received them.
15. I was referred to the HMRC account details. This records that payments of £33.43 per week were recorded from 'Gemma Kane' on the claimant's account between 6 April and 2 November 2020. There were other documents which the claimant has located since indicating that there may have been other payments, but it was that information that she had at the time. There is nothing on those HMRC records that show that they are furlough payments, but they are the same figure as the weekly amounts which the respondent's accountant calculated as sums due to the claimant if furlough was payable. It is difficult to know exactly what they are and exactly what has gone on and all parties were unable to ascertain what these figures were, despite the enquiries being made by Mr Lonergan of the respondent's accountants. The issue however is that the claimant has never received such payments.
16. What became clear during the enquiries made of the accountants was that the reason that the claimant was not eligible for any furlough payments was because a P45 had been mistakenly issued by the accountants on 22 March

2020 advising HMRC that her employment had terminated. As such she was not an employee or worker at the relevant time such that she could be enrolled in the furlough scheme. It is unclear why such a P45 was issued, or indeed why there then appear to be payments recorded on her HMRC account from the respondent.

17. What has hindered the claimant's enquiries and the Tribunal's understanding of her pay and HMRC accounts is that she received no payslips after 22 March 2020 when the P45 was issued. Further I accept her evidence that she did not receive any payslips during the time she worked for the respondent. The respondent's system is one where an email is sent providing an individual with access to their payslips on-line, but the claimant says she did not receive that email. Although the accountants say that they did send a link there is no email before me or evidence that the respondent has been able to produce which confirms that that link was sent. Ms Kane herself was vague about it, understandably she left it to her accountants, but I have to consider matters on the balance of evidence and on balance I accept the claimant's evidence.

The Law

Protected Disclosures

18. Protected disclosures are governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of Sections 43C to 43H.

s43B(1): in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:

- (a) that a criminal offence has been committed, is being committed, or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with a legal obligation to which he is subject,
- (c) ...
- (d) ...
- (e) ...
- (f) ...

Unfair Dismissal

19. Section 103A of the Act deals with protected disclosures and reads as follows:-

"an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

20. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee.

In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

Unauthorised Deductions from Pay

21. The right not to suffer unlawful deductions from pay arises under Part II of the Employment Rights Act 1996. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by her. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1) or exempt under section 14.

Itemised Pay Statement

22. Section 8 of the Employment Rights Act states at section 8(1) that a worker has a right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement. Section 8(2) sets out the details which the document shall contain.
23. If it fails to do so, section 11 and 12 provides that the matter may be referred to the Employment Tribunal and that the Tribunal may make a declaration to the effect that an employer has failed to provide a pay statement (section 12(3)) and may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions (section 12(4)).

Decision

24. I find that the claimant's contract was terminated by the respondent by way of the message on 5 November. The sequence of events was that options were put to the claimant by Ms Kane. She initially said she would accept the offer made that Ms Kane (or the respondent) would find the money to repay her and she would be given her P45, but she then questioned the figures and it is clear from the messages that I have seen that there was no agreement reached. It is notable that this was also the respondent's view because Ms Kane's partner on behalf of Ms Kane then withdrew the offer and told the claimant that she was being given four weeks' notice of termination. It is clear and unambiguous termination of her contract. Although there was no payment for those four weeks because it was a zero hours contract it seems to me that although notice was purported to be given, all parties considered that the contract was ended and the relationship over as of 5 November and indeed a claim to this Tribunal was issued on 2 December.

Automatic Unfair Dismissal

25. The protected disclosure upon which the claimant relies is the message she sent to the respondent on 10 November enclosing a copy of her HMRC record showing monthly payments and asking Ms Kane if she could recheck whether she had in fact been paid these furlough amounts. The claimant argues that this amounts to a protected disclosure. Although it would be normal to firstly

consider whether the claimant was an employee and whether that message could amount to a protected disclosure, the claimant has the burden of showing that the reason (or principle reason) for the termination of her contract was because she had made a protected disclosure or if it is argued as a detriment that the termination was because she had made the disclosure. She relies upon the disclosure she made on 10 November, but the decision to terminate her contract was on 5 November. It was at that date that Ms Kane made that decision and as such the timeline does not support the claimant's case.

26. The claimant has not therefore shown that the reason (or principle) for the termination of her contract was because of or indeed had anything to do with her disclosure.
27. This claim fails and is dismissed.

Unauthorised deductions

28. I must consider whether the amounts claimed by the claimant, being furlough payments between 6 April and 2 November 2020, that she says were deducted were properly payable to her, such that she was entitled to those amounts. I find that the respondent offered to place the claimant on furlough and the claimant agreed to that in writing. This is clear in the exchanges by WhatsApp and the Facebook messages between Ms Kane and the claimant. I am satisfied that the claimant has shown that as a series of messages, taken as a whole, they were sufficient to amount to an agreement to that effect. But was it as put forward by Mr Lonergan, a conditional agreement?
29. Mr Lonergan's primary position was that there was no agreement, however he says that if there was an agreement any payment to the claimant was conditional upon the respondent receiving payment from HMRC. I agree that both parties expected that the money to pay the claimant would come from the government and that it was an implied term of the agreement that the claimant would be paid when the respondent was paid. As the claimant was on a zero hours contract, had she not been on the furlough scheme she wouldn't have received any payments from her employer when there was no work. I consider that had both parties applied their minds to it, this was a term they would have agreed. However, I consider that the condition was wider than that. It was also an implied term that the respondent would fulfil its HMRC responsibilities towards the claimant and the general administrative functions for which the accountant was engaged. This would be necessary for business efficacy and again had the parties addressed their mind to it at the outset of the contract, it would have been agreed as a term of the contract. This would include ensuring that it did not advise HMRC that the claimant's employment had ended when it had not.
30. I therefore consider that the condition which applied to the agreement was that furlough payment would be made when the respondent was paid by HMRC or would have been paid but for the respondent's or agent's failure to fulfil its HMRC responsibilities towards the claimant. The respondent accepts that the reason that it was not able to successfully claim furlough payments for the claimant from HMRC was because its accountants had issued a P45

on 22 March 2020 thereby advising HMRC that she was no longer employed. Had they not done this claimant would have been successfully enrolled on the furlough scheme and received payment. The condition was therefore met, and the claimant was entitled to be paid the furlough pay.

31. The furlough payments were properly due to the claimant from the date that she was put on furlough which was March 2020 and therefore by not making those payments the respondent had unlawfully deducted the amounts due to the claimant for the furlough pay. I accept that this was not the fault of Ms Kane as an individual who sought to do her best for the claimant, but the respondent must take responsibility for its actions and that of its accountants in mistakenly issuing a P45 for the claimant in March 2020.

Unnotified Deductions

32. Based upon my findings of fact, the claimant was not provided with an email with a link to access payslips and therefore she has no way of accessing them. In any event, there were no payslips produced after 22 March 2020 when the mistaken P45 was issued, even though the respondent has accepted that the claimant remained a worker during that period. As such, she was not notified of the deductions which the respondent made in not providing her with furlough payments during the period claimed I therefore make a declaration to that effect.

Remedy

33. The period during which the claimant was not paid furlough pay was 31 weeks ending on the date of termination of her contract. During that period, according to the Government's furlough scheme the claimant's furlough pay was based upon the average hours she worked in the previous tax year 2019/20. She had commenced work with the respondent in May 2019. In the tax year 2019/20 she worked an average of 10.3 hours per week at a rate of £7 per hour.
34. The parties agreed that the amount of the furlough payment due was £51.53 per week (being 80% of £71.92) x 31 weeks. Totalling £1783.61. I award that amount.

Employment Judge Benson

16 March 2022

JUDGMENT SENT TO THE PARTIES ON

18 March 2022

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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